

EITI Validation Germany 2023

[Coordinated position for the government stakeholder group on the EITI Standard Requirement No. 4.7 \(Level of disaggregation\)](#)

I. Situation

Requirement 4.7. in Section 4 (Revenue collection) of the EITI Standard 2019 reads:

4.7 Level of disaggregation.

It is required that EITI data is disaggregated by each individual project, company, government entity and revenue stream.

A project is defined as operational activities that are governed by a single contract, license, lease, concession or similar legal agreement, and form the basis for payment liabilities with a government. Nonetheless, if multiple such agreements are substantially interconnected, the multi-stakeholder group must clearly identify and document which instances are considered a single project.

Substantially interconnected agreements are a set of operationally and geographically integrated contracts, licenses, leases or concessions or related agreements with substantially similar terms that are signed with a government, giving rise to payment liabilities. Such agreements can be governed by a single contract, joint venture, production sharing agreement or other overarching legal agreement.

Where a payment covered by the scope of EITI disclosures is levied at entity level rather than at project level, the company may disclose the payment at the entity level.

The requirement in 4.7 of the EITI Standard was not examined during the initial validation in 2019, since it was at that time not yet a mandatory part of the EITI reporting. According to the D-EITI Secretariat's assessment, the requirement in Germany affects the revenue stream of **mine site and extraction royalties** only, as these relate directly to a company's extraction of natural resources. In contrast, trade and corporate taxes are not natural resource-specific royalties levied for extraction.

The **5th D-EITI Report** presents the state revenues from mine site and extraction royalties for the 2020 reporting period **at federal state level**.¹ In addition, the data reported by companies as part of the data collected by the Independent Administrator on natural resource-specific mine site and extraction royalties is disaggregated by **individual company** and **individual federal state** as the payment recipient **or the mining offices**.² Following consultation between the D-EITI Secretariat and the International Secretariat, the reference for the revenue stream of mine site and extraction royalties according to requirement 4.7 was determined to be the "individual project" and the associated "legal agreement".

¹ Extraction royalties in Chapter 5.b.ii., Table 5, p. 71, Mine site royalties in Table 6, p. 72 in addition to data disaggregated by federal states and companies on the Reporting Portal, Data Reports 2020 (Mine site_extraction royalties spreadsheet).

² Chapter 10 of the IA, Table 14 (pages 181-182) and Table 15 (page 183).

II. Assessment

As a result, the requirement to disaggregate data in accordance with Subsection 4.7 of the EITI Standard is fully met.

1. Definition of the D-EITI project concept

The D-EITI has defined the project concept for itself. This is addressed by the Independent Administrator (IA) in Chapter 10.a.iv.³ The IA points out that the MSG has decided to implement the content and scope of the project concept as specified in Section 341r no. 5 of the German Commercial Code (HGB).⁴ The provision contains legal definitions in relation to disclosure obligations of specific companies in the extractive industries in accordance with Sections 341q et seq. and 325 et seq. of the German Commercial Code.

A project within the meaning of Section 341r no. 5 of the German Commercial Code⁵ is the combination of operative activities forming the basis for payment liabilities vis-à-vis a governmental body and that are governed by

- (a) a contract, license, lease, concession or similar legal agreement or
- (b) a body of contracts, licenses, leases or concessions, or agreements affiliated with them, with a governmental body that are interconnected in operative and geographical terms and that essentially provide for similar terms.

Taking the provisions of the German Commercial Code as a basis is intended to serve the purpose of creating the broadest possible participation of companies and to avoid the possibility of a double burden for them due to participation in the EITI.⁶

2. Calculation of the amount of mine site and extraction royalties to be paid in accordance with the Federal Mining Act (BBergG)

The exact calculation of the amount of the mine site and extraction royalties is to precede the disclosure of the resulting data:

The Federal legislator has set the scale and the standard rates specifically for the royalties in the Federal Mining Act. For this reason, mine site and extraction royalties in Germany cannot be contractually agreed on freely with authorities. The generation of mine site and extraction royalties is actually regulated in the Federal Mining Act.

Anyone intending to explore for non-minable natural resources requires an exploration licence (Section 7 of the Federal Mining Act), anyone wishing to extract such resources requires an extraction licence (Section 8 of the Federal Mining Act) or mining proprietorship (Section 9 of the Federal Mining Act). For this purpose, an application must be submitted in writing to the competent authority (Section 10 of the Federal Mining Act).

The authority will subsequently examine the application and grant or award the right on a legal basis for a specific field (exploration licence field within the meaning of Section 7(1) of

³ Page 154

⁴ Chapter 10.a.iv., page 154

⁵ https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.pdf (https://www.gesetze-im-internet.de/hgb/__341r.html)

⁶ Cf. chapter 10.a.ii., page 147.

the Federal Mining Act or extraction licence field within the meaning of Section 8 (1) of the Federal Mining Act).

- The licence holder is legally required to pay an annual field royalty for commercial exploration (Section 30 of the Federal Mining Act). The amount of field royalty to be paid will depend on the size of the licence field in square kilometres and will increase with the duration of the licence (Section 30(3) of the Federal Mining Act).
- The licence holder or owner of the mining property is required to pay an annual mining royalty for the resources extracted (Section 31(1) of the Federal Mining Act). The amount of the mining royalty to be paid will be based on the average value of the natural resources extracted (Section 31(2) of the Federal Mining Act).

The state governments are authorised to determine the standard rates, taking into account regional peculiarities and observing the provisions of the Federal Mining Act and case law. For this purpose, Section 32 of the Federal Mining Act includes a provision authorising the state governments to issue ordinances required for the calculation, collection and adjustments of the mine site and extraction royalty in more detail.⁷

In Lower Saxony, for example, the details are regulated in the Ordinance on mine site and extraction royalties (NFördAVO).⁸ Section 32 of the Federal Mining Act concludes by stipulating under which conditions and within which framework the federal states may specify deviations from the statutory standard rates in the Federal Mining Act by means of ordinances⁹. The state authorities are not given "free rein" to go beyond the statutory regulations on mine site and extraction royalties.

3. Determination of company payments by the federal state mining authorities.

The mining authorities implement the requirements defined by the respective state government on the basis of the federal framework conditions (e.g. Lower Saxony Ordinance on mine site and extraction royalties).

The basis for establishing the royalties to be paid is a notice issued by the authority after reviewing company details. The royalty is established on a regular basis, as long as the factual and legal basis for collecting the royalties during the collection period has not been conclusively examined by the authority, with the proviso that a review be made with no justification required. The notice may be unilaterally revoked by the authority as an administrative act if the legal requirements are met or may also be reviewed in court.

The three types of mining authorisation (exploration licence, extraction licence and mining proprietorship) grant the applicant an exclusive right. These types of authorisation are granted or awarded only to natural or legal persons and business partnerships (Section 6 of the Federal Mining Act). The revenues from mine site and extraction royalties are paid to the federal state in which the mining licence field is located (Sections 30(2) and 31(3) of the

⁷ https://www.gesetze-im-internet.de/englisch_bbergg/englisch_bbergg.html#p0086

⁸ Niedersächsische Verordnung über die Feldes- und die Förderabgabe (NFördAVO) vom 10. Dezember 2010. (Nds. GVBl. S. 564, Zuletzt geändert durch Art. 1 ÄndVO vom 24.1.2023 (Nds. GVBl. S. 2), abrufbar unter: <https://voris.wolterskluwer-online.de/browse/document/43fd6089-77a9-32fb-93a4-d046bcaaccac> (Lower Saxony Ordinance on mine site and extraction royalties of 10 December 2010 (Nds. GVBl. p. 564), as last amended by regulation of 11 February 2021 (Nds. GVBl. p. 52) available for download at https://d-eiti.de/Downloads/D-EITI%20Report%205_EN.pdf)

⁹ Weller/Ulrich Kullmann BBergG 2012 § 32 Rn 2.

Federal Mining Act), whereby revenues from the extraction royalty are to be paid into the system of revenue distribution among the federal states.

A case in point: In Lower Saxony, establishing the royalty rates in accordance with the Ordinance on mine site and extraction royalties is essentially based on the type of natural resources and, in exceptional cases, on the geological parameters of the mining areas, in addition to the production rates of individual boreholes. This means that in Lower Saxony general royalty rates are set for the natural resources extracted in the state. An individual deposit or an individual company project in this case are not relevant. The companies concerned receive a collective notice from the competent authority for each royalty collection period, which lists the total amount of royalty to be paid and the individual fields, including the corresponding production rates of the natural resource.

4. Conclusion

The disaggregation of data is carried out in accordance with the requirements of the EITI Standard. A project as specified by the D-EITI is a summary of operational activities which form the foundation for payment obligations to a government agency.

The legal basis for determining the payment obligations from mine site and extraction royalties is the Federal Mining Act. The mining authorities establish the mine site and extraction royalties in accordance with the applicable legal regulations.

According to the way in which the Federal Mining Act is organised, there is on the one hand the level of the companies as recipients of the notices and payers, and on the other hand the level of the federal states as payees.

Consequently, the revenue stream of the mine site and extraction royalties results from all the operational activities performed by the extractive company in each federal state.